2002

Fashion Place Associates v. Glad Rags, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

FASHION PLACE ASSOCIATES, Plaintiff, Respondent and Cross-Appellant, vs. GLAD RAGS, INC., Defendant and Appellant,	)	Civil No. 20514

BRIEF OF RESPONDENT AND CROSS-APPELLANT

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ISSUES PRESENTED ON APPEAL

1. There is substantial evidence in the record on appeal to support the finding of the trial court that Glad Rags breached the lease agreement by abandoning the premises.

2. The trial court acted correctly in refusing to find that Glad Rags was entitled to an interest in the lease payments of the replacement tenants.

3. The finding of the trial court that Glad Rags abandoned the leasehold has substantial support in the record.

4. The trial record contains substantial support for the finding that Fashion Place acted reasonably to mitigage damages caused by Glad Rags' breach of the lease.

5. The judgment of the lower court is inconsistent with the Findings of Fact and Conclusions of Law.

6. The finding of the trial court that Glad Rags abandoned any personal property left in the leasehold is supported by substantial evidence.

7. Fashion Place will return Glad Rags' security deposit upon satisfaction of the judgment awarded herein.

STATUTORY PROVISIONS DETERMINATIVE OF APPEAL

78-36-12.3 Definitions.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

78-36-12.6. Abandoned premises - retaking and rerenting by owner - liability of tenant-personal property of tenant left on premises. In the event of abandonment the owner may:

(1) Retake the premises and attempt to rent them at fair rental value and the tenant who abandoned the premises shall be liable:

(a) For the entire rent due for the remainder of the term;

(b) For rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable

> commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection shall apply, if less than subsection (a) notwithstanding that the owner did not re-rent the premises.

STATEMENT OF THE CASE

Fashion Place Associates, Plaintiff, Respondent and Cross-Appellant (hereinafter "Fashion Place") as Lessor sought recovery of damages it sustained as a result of a breach of a written lease agreement by Lessee, Glad Rags, Inc., (hereinafter "Glad Rags").

The Honorable David B. Dee, Judge of the Third Judicial District Court in and for Salt Lake County, sitting as trier-of-fact, found in favor of Fashion Place.

However, the trial court judgment awarding Fashion Place damages in the amount of $12,233.00 is inconsistent with the lower court's finding that the accrued lease charges actually totalled $24,467.87.

On Cross-appeal, Fashion Place requests that this action be remanded to the lower court with the direction that the inconsistency be cured by an appropriate modification of the judgment.

With that exception, Fashion Place asks that the judgment of the trial court be sustained, and that in addition Fashion Place be awarded attorney's fees incurred in this appeal.

Statutory citations herein are to the Utah Code Annotated, 1953, as amended unless otherwise indicated.

STATEMENT OF FACTS

On June 10, 1974, Fashion Place by written agreement leased to Glad Rags certain commercial space in the Fashion Place Mall, located in Salt Lake County. (Exhibit 1; R. 317, 491). The term of the lease was 15 years (Exhibit 1; R. 6).

Marie Smith, President of Glad Rags, read the lease and had it reviewed by her own counsel prior to signing it. (R. 492). The portions of the lease agreement relevant to the issues raised on appeal are set out in full in the appendix to this brief.

Glad Rags operated a women's clothing store at the Fashion Place Mall from 1974 through December 31, 1981. (R. 492). On December 31, 1981, the fifteen year term of the lease still had eight years to run. (Exhibit 1; R. 6).

By 1981, the Glad Rags store at Fashion Place Mall was operating at a marginal level. (R. 492, 493). As early as 1980, Glad Rags had signed a written memorandum agreeing to terminate the lease if Fashion Place would pay Glad Rags $50,000.00. (Exhibit 4; R. 338). According to that memorandum Fashion Place would try to locate a prospective tenant who would be willing to pay that sum for the priviledge of entering into a new lease with Fashion Place for the space Glad Rags wanted to vacate. (R. 334, 338, 340, 341).

Subsequently, similar memoranda were signed in which the $50,000.00 figure was reduced. (Exhibits 5, 6).

Between December 31, 1979 and December 31, 1981, Fashion Place located a prospective tenant willing to pay $15,000.00 to occupy the Glad Rags space. Glad Rags rejected that proposal. (R. 493, 494).

In the fall of 1981, Marie Smith, President of Glad Rags, met with Robert Garwood, center manager of the Fashion Place Mall, an employee of Ernest W. Hahn Corporation, the managing agent of the lessor. (R. 314, 325). At that meeting Mrs. Smith told Garwood that Glad Rags was not doing well and that Glad Rags wanted to move out at the end of the year. (R. 325).

Mr. Garwood indicated he wanted Glad Rags to stay, and that if the store were closed he could not guarantee that the landlord would not pursue Glad Rags for the arrearages that would accrue after they vacated the space. (R. 325, 332).

Mrs. Smith disputes this version of her conversation with Garwood. (R. 504). She states that Garwood told her there would be no problem with her vacating the store as of December 31, 1981, and that she would get her security deposit back and would receive a written release from Fashion Place. (R. 504).

On cross-examination, Mrs. Smith testified that there was no specific discussion at the meeting of responsibility for future lease charges. (R. 495-494).

There is no written release. (R. 496). Marie Smith's husband, who Mrs. Smith testified was present at the meeting with Garwood, (R. 504), was not called as a witness by Glad Rags.

Glad Rags closed the Fashion Place store effective December 31, 1981. (R. 492). No lease charges have been paid since that date. (R. 496).

After December 31, 1981, Mrs. Smith turned over the task of moving the personal property of Glad Rags out of the vacated store to her son, Jeffrey Smith (R. 496), an officer of Glad Rags, Inc. (R. 524). Jeffrey Smith testified that in January of 1982, shortly after vacating the premises, he provided Mr. Garwood with a key to the store and that he kept his own key to the space through February or March, 1982. During that time Jeffrey Smith continued to move items out of the premises on an intermittent basis. (R. 546).

Jeffrey Smith also testified that he asked for and received permission from Garwood to leave certain items of miscellaneous personal property in the premises, with the hope of selling that property to a new tenant. (Exhibit 8; R. 539, 540). Mr. Garwood recalled granting a request from Jeffrey Smith that Glad Rags be allowed to leave a counter and some clothes racks in the premises, on the condition that Jeffrey Smith remove them upon 48 hours notice from Fashion Place. (R. 394, 451).

Mr. Garwood recalled that he gave notice to Jeffrey Smith that the items left behind be removed. (R.481). Jeffrey Smith had no such recollection. (R. 540). However, Jeffrey Smith testified that he never on any occassion requested the return of any personal property left in the premises (R. 549, 550).

After Glad Rags vacated the premises on December 31, 1981, Fashion Place initiated efforts to relet the premises. (R. 318). Those efforts involved the central leasing department of Ernest W. Hahn Corporation (R. 318), and Mr. Garwood. (R. 319).

The original 1974 Glad Rags lease was based on a per foot rate of $8.50 per square foot per year. (R. 459). In 1982, after Glad Rags had vacated the premises, Fashion Place attempted to relet the premises for approximately $15.00 to $20.00 per square foot. (R. 471).

Mrs. Smith testified that she knew when she closed the store that leases at the Fashion Place Mall were commonly going for approximately $17.00 per square foot. (R. 494).

Eventually, the vacated space was actually relet to two separate tenants, Fleet Foot and Life Uniforms, in April of 1983. (R. 319).

Between December 31, 1981, the date on which Glad Rags vacated the premises, and April 1, 1983, when the new tenants

started paying rent, lease charges accrued under the original lease in the amount of $24,467.87. (Exhibit 2; R. 322).

SUMMARY OF ARGUMENT

1. There is substantial evidence in the trial record to support the lower court's finding that Glad Rags breached the lease agreement by abandoning the premises.

2. The trial court acted correctly in refusing to find that Glad Rags was entitled to an interest in the lease payments of the replacement tenants.

3. The finding of the trial court that Glad Rags abandoned the leasehold has substantial support in the record.

4. The trial record contains substantial support for the finding of that Fashion Place acted reasonably to mitigate damages caused by Glad Rags' breach of the lease.

5. The judgment of the lower court is inconsistent with the Findings of Fact and Conclusions of Law.

6. The finding of the trial court that Glad Rags abandoned any personal property left in the leasehold is supported by substantial evidence.

7. Fashion Place will return Glad Rags' security deposit upon satisfaction of the judgment awarded herein.

ARGUMENT

POINT 1

THERE IS SUBSTANTIAL EVIDENCE IN THE TRIAL RECORD TO SUPPORT THE LOWER COURT'S FINDING THAT GLAD RAGS BREACHED THE LEASE AGREEMENT BY ABANDONING THE PREMISES.

Glad Rags contends on appeal that the finding of the trial court that Glad Rags abandoned the premises, thereby breaching the lease agreement, should be overturned.

The lower court specifically found as a matter of fact tht Glad Rags breached the lease agreement by abandoning the premises. (Finding of Fact 2(a); R. 280; App. p. 2).

A. Scope of Review.

On appeal, this court must determine if findings of fact are supported by substantial evidence in the record. Numerous Utah decisions describe the appellate court's scope of review as regards findings of fact adopted by the trial court. Those decisions are annotated at length at 3 P.D. (367 P.2d) -- 242-388.

By way of example, this court has stated that the reviewing court should sustain the trial court's findings even if the reviewing court might have come to a different decision. Wash-O-Matic Inc., v. Rupp, 532 P.2d 682, (Utah 1975). The reviewing court should defer to findings of fact rather than substitute its own judgment unless it can be determined as a matter of law that no one could reasonably find as did the fact finder. Carnescca v. Carnescca 572 P.2d 708 (Utah 1977).

The lower court's finding of fact should not be upset unless all reasonable minds would find to the contrary. Robertson v. Hutchinson, 560 P.2d 1110 (Utah 1977). Those findings must be sustained where there is competent supporting evidence in the trial record. Dockstader v. Walker, 510 P.2d 526, 29 Utah 2d 370 (1973). Findings of fact will be reviewed in a light most favorable to the trial court and they should not be disturbed unless all reasonable minds would find to the contrary. Hanover Ltd. v. Fields, 568 P.2d 751 (Utah 1977).

Where an appellant contends that the lower court erred in refusing to make certain findings, that appellant is obliged to show that there is credible and uncontradicted evidence which proves the contended facts with such certainty that all reasonable minds must so find; conversely if there is any reasonable basis, either in the evidence or from lack of evidence, upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence, then the findings should not be overturned. First Western Fidelity v. Gibbons and Reed Company 492 P.2d 132, 27 Utah 2d 1 (1971)

Actions for breach of contract are actions at law, and findings should be affirmed if there is substantial evidence in support in the record. Flynn v. Schocker Lawn Company, 459 P.2d 433, 23 Utah 2d 140 (1969).

"Where there is competent evidence to support a finding of abandonment of contract, the Supreme Court cannot substitute

its judgment for that of the lower court even if it disagrees with the finding of the lower court." Pitcher v. Lauritzen, 423 P.2d 491, 18 Utah 2d 368 (1967). Other Utah decisions are in accord.

B. The Evidentiary Record.

The trial record contains abundant support for the finding of breach by abandonment. The written lease agreement (Exhibit 1; R. 6) requires that the tenant make regular lease payments (Exhibit 1; R. 8; App. p. 12), and that the tenant uninterruptedly conduct and operate its business from the premises during the lease term. (Exhibit 1; R. 19; App. p. 16).

The uncontradicted testimony of Mrs. Smith, president of Glad Rags, Inc, is that she vacated the lease premises mid-term on December 31, 1981. (R. 492), and has made no lease payments since that date. (R. 496).

Glad Rags has only one response to the assertion that its conduct breached the lease. Glad Rags claims that Robert Garwood, the center manager, orally waived the lease agreement. However, the lease agreement clearly prohibits oral waivers. (Exhibit 1; R. 28; App. p. 19). In addition, Mr. Garwood, the center manager, directly disputed Mrs. Smith's testimony. (R. 322).

On review, the evidence in the record strongly preponderates in favor of the finding that Glad Rags breached

the lease agreement by abandoning the premises as the trial court found.

POINT II

THE TRIAL COURT ACTED CORRECTLY IN REFUSING TO FIND THAT GLAD RAGS WAS ENTITLED TO AN INTEREST IN LEASE PAYMENTS OF THE REPLACEMENT TENANTS.

At trial Glad Rags contended that Fashion Place was not damaged by Glad Rags' breach of the lease because the leases of the replacement tenants, eventually found by Fashion Place, called for a substantial rent increase. The lower court rejected this argument and instead found Fashion Place was entitled to recover the lease arrearages that accrued between the breach date, December 31, 1981 and the date the replacement tenats started paying rent, April 1, 1983. The trial court's action was correct for two reasons.

First, the evidence presented at trial was inadequate to support Glad Rags' claim. Second, the contention ran contrary to the language of the lease as well as the controlling statute.

Glad Rags did not introduce any documentary evidence or expert testimony in support of its argument. The chart found on p. 20 of Appellant's Brief was not offered or introduced into evidence at trial. In point of fact, the only support found in the record are the extrapolations of counsel for Glad Rags based on the testimony of Mr. Garwood. (R. 464-480). The dialogue presented in the trial transcript is

totally confusing as it constantly refers to blackboard calculations of counsel which were not made part of the trial record.

More important, Glad Rags made no attempt to rebut the reasonable inference that Fashion Place would have leased other space at the mall to the replacement tenant if Glad Rags had not abandoned its own leasehold. The dismal factual record, on its own, is adequate explanation for the trial court's refusal to speculate in favor of Glad Rags.

As bad as the factual record is, it is matched by an equal lack of legal foundation.

First, the legal discussion presented on this point in Issue II of Appellant's Brief (p.18) totally ignores the controlling Utah statute. Section 78-12-6(1)(b) provides that when an abandonment occurs the abandoning tenant shall be liable:

> "(b)" for rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection shall apply, if less than subsection (a) notwithstanding that the owner did not re-rent the premises. (Emphasis added).

The statute states the mandatory measure of damages unambiguously. Glad Rags' suggestion that the lower court apply the statutory measure of recovery on a conditional basis, depending on an inquiry into lease terms agreed to by

replacement tenants, is unwarranted, and if adopted, would violate the clear meaning of the statute.

Second, the mutually agreed to lease, (Exhibit 1) prohibits a breaching tenant from collecting rent from replacement tenants. The relevant part of Article 22 of the lease reads:

> "nor shall the Tenant hereunder have any right or authority to collect any rent from such tenant." (Exhibit 1, Article 22; R. 22; App. p. 18).

The trial court's refusal to speculate without legal authority on an extremely vague factual record was both reasonable and proper, and that decision should not be disturbed on appeal.

POINT III

THE TRIAL COURT'S FINDING THAT GLAD RAGS ABANDONED THE LEASEHOLD HAS SUBSTANTIAL SUPPORT IN THE RECORD.

Glad Rags suggests in Issue III of its Brief on Appeal that the trial court erred in not finding as matter of fact an implied surrender and acceptance, rather than an abandonment. The question presented on appeal is whether the lower court's refusal to make such a finding is supported by the trial record. Stated another way, this court must determine if the record contains clear and uncontradicted evidence of the facts that would establish an implied surrender, to the degree that reasonable minds could not find otherwise.

Point I of this Brief reviews the uncontradicted

factual record establishing an abandonment as of December 31, 1981, the date on which Glad Rags vacated the premises. However, Glad Rags argues that approximately 6 months later that abandonment was transposed into an accepted surrender. The alleged causal agent of this legal alchemy was the use of the premises by Fashion Place for intermittent tenant meetings and temporary storage.

"Abandonment" as applied to leases, involves the absolute relinquishment of premises by the tenant and consists of act or omission and intent to abandon. Tuschoff v. Westover, 395 P.2d 630, 665 Wash. 2d 69 (1964). The intent of a lessee, who has vacated the premises, to relinquish all rights therein can be shown by words or conduct. The question of abandonment is a factual one depending on all the surrounding circumstances and, unless reasonable men could not differ, the question is for the jury. Gangadean v. Erickson, 495 P.2d 1338, 17 Ariz. App. 131 (1972).

Both act and intention are clear in the trial record. In the fall of 1981, Mrs. Smith of Glad Rags told the center manager that she would be closing her store on December 31, 1981. (R. 494). The store was in fact closed effective that date. (R. 492). At the time the store was closed, Glad Rags had no intention of every reoccupying the space. (R. 497). It was Glad Rags' understanding that after the store was closed, Fashion Place, "would own the space and could do whatever they

wanted with it." (R. 497). At no time has Glad Rags ever sought or asked permission to reoccupy the premises. (R. 497). No lease payments of any kind have been made since December 31, 1981. (R. 496).

By both word and deed, Glad Rags has indicated its clear intention to abandon the premises.

Glad Rags having abandoned the premises, Fashion Place had both a contractual and a statutory right to exercise control over the premises. Section 78-36-12.6(1) states that in the event of abandonment the owner may "retake the premises . . ."

Glad Rags' discussion of implied surrender completely ignores this statutory directive. The statutory provision, by permitting an owner to retake abandoned premises and to hold the abandoning tenant liable for rent which accrues until the premises can be relet, takes precedence over prior case law.

POINT IV

THE TRIAL RECORD CONTAINS SUBSTANTIAL SUPPORT FOR THE FINDING THAT FASHION PLACE ACTED REASONABLY TO MITIGATE DAMAGES CAUSED BY GLAD RAGS' BREACH OF THE LEASE.

The lower court found as a matter of fact, (Finding 3; R. 280, App. p. 2), and law, (Conclusion 3, R. 282; App. p. 4) that Fashion Place made reasonable efforts to relet the premises at fair market value.

The testimony of Mr. Garwood regarding the reletting

effort was uncontradicted. Glad Rags' criticism of the reletting efforts arises from the fact that Fashion Place sought to relet the premises for between $15.00 and $20.00 per square foot per year. The rental rate of the original 1974 lease was $8.50 per square foot. Glad Rags believes that Fashion Place, in seeking to obtain the increased rental rate failed to meet its duty to mitigate.

The lower court's finding that Fashion Place made reasonable efforts to mitigate should not be disturbed if the trial record, examined in a light most favorable to the lower court, contains evidence that would support the finding. Sharf v. BMG Corporation, 8 Utah Adv. Rep. 11 (04/16/85). Section 78-36-12.6(1)(b) requires that an owner re-rent at a "fair rental value." Was the rental rate sought by Fashion Place, $15.00 to $20.00 per square foot, a "fair rental value"?

Mrs. Smith of Glad Rags testified without contradiction that when she closed the store leases were commonly going at the Fashion Place Mall for around $17.00 per square foot. (R. 494). It was her impression that Fashion Place would not be damaged by Glad Rags' leaving because the space would be relet for approximately twice what Glad Rags was paying. (R. 494, 495). Mr. Garwood, the center manager, testified without contradiction that the fair market value of the lease was between $15.00 and $20.00 per square foot. (R. 362). No other evidence was presented at trial as regards the fair rental

value of the premises.

On appeal, Glad Rags urges this court to ignore Section 78-36-12.6(1)(b), and instead hold that the duty to mitigate requires a lessor to attempt to relet abandoned premises for less than the fair rental value. That suggestion should be rejected.

The law does not and should not require that a lessor "fire sale" his premises for the benefit of a breaching tenant. Section 78-36-12.6(1) only requires that an owner seek to re-rent at a "fair rental value." The discussion of this issue in Glad Rags' Brief on Appeal (p. 33) completely ignores Section 78-36-12.6(1)(b). The cases cited by Glad Rags, all decided prior to the 1981 adoption of that section, merely stand for the undisputed proposition that a lessor must take reasonable steps to mitigate his damages. This court should reject the suggestion that a reasonable lessor must re-rent at less than a fair rental value in order to meet its duty to mitigate.

POINT V

THE JUDGMENT OF THE LOWER COURT IS INCONSISTENT WITH THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Glad Rags argues on appeal that the judgment of the trial court, awarding Fashion Place exactly 50% of the arrearages which accrued between December 31, 1981 and April 1, 1983, is inconsistent with the Findings of Fact and Conclusions

of Law, and is not supported by evidence adduced at trial.

Fashion Place, cross appealing on this issue, agrees.

The trial court found as a matter of fact, that the actual arrearages which accrued between Glad Rags' abandonment of the premises and the reletting of those premises was $24,267.87. (Finding 4; R. 282; App. p. 2). The trial court concluded as a matter of law, under Section 78-36-12.6, that Fashion Place was entitled to recover rent accrued during the period necessary to relet at a fair rental value. (Conclusion 8; R. 283; App. p. 5). Finally, the trial court found that the efforts of Fashion Place to relet were reasonable. (Finding 3; R. 280; App. p. 2).

Inexplicably, the judgment awarded Fashion Place is only one-half of the actually accrued lease charges.

Fashion Place cross appeals this aspect of the judgment, and requests that this action be remanded to the lower court with the instruction that the judgment be amended so as to be consistent with the Findings of Fact and Conclusions of Law entered below.

POINT VI

THE FINDINGS OF THE TRIAL COURT THAT GLAD RAGS ABANDONED ANY PERSONAL PROPERTY LEFT IN THE LEASEHOLD IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial court found that as a matter of fact that any property which Glad Rags left in the premises after closing the store was abandoned. (Finding of Fact 7; R. 282; App. p. 3)

This finding has substantial support in the trial record. Mr. Garwood, the center manager, testified that he gave Jeffrey Smith of Glad Rags permission to store unidentified miscellanous property in the abandoned premises on the condition that Glad Rags removed whatever was left upon 48 hours notice to do so from Fashion Place. (R. 451). Garwood testified that he later phoned Jeffrey Smtih and requested that the items left be removed. (R. 451). Jeffrey Smith denied ever receiving such a request. (R. 540). However, Smith admitted that he never at any time requested the return of the items left in the abandoned premises. (R. 549). The obvious inference to be drawn from these facts is that Glad Rags had no interest in reclaiming whatever property was left in the premises.

The trial court's finding that the property was abandoned is certainly supported by the testimony of Mr. Garwood. On that basis, the finding of the lower court should not be disturbed on appeal.

POINT VII

FASHION PLACE WILL RETURN GLAD RAGS' SECURITY DEPOSIT UPON SATISFACTION OF THE JUDGMENT AWARDED HEREIN.

Fashion Place agrees that Glad Rags is entitled to credit for the security deposit held by Fashion Place. That security deposit is in the form of a First Federal Savings and Loan Savings passbook, account no. 2-280377-20, payable to Glad Rags Inc., containing $2,267.00 as of September 26, 1974.

Fashion Place agrees to surrender the passbook to Glad Rags upon satisfaction of the judgment awarded herein. Fashion Place hereby indicates its willingness to stipulate to an appropriate modification of the lower court judgment on this point.

CONCLUSION

A fair review of the record on appeal reviews that each of the lower court's findings is supported by substantial, often uncontradicted, evidence. Those findings should not be disturbed on appeal.

The legal arguments advanced by Glad Rags suffer from one overwhelming general defect. For the most part those arguments ignore the controlling statute, Section 78-36-12.6, adopted in 1981. Instead of addressing this new addition to the Utah statutes, the appellant concentrates on dated case law, obsolete under the new statute.

However, on two points, Fashion Place and Glad Rags are in agreement.

First, the judgment awarding Fashion Place only one-half of the arrearages which actually accrued prior to reletting is inconsistent with the Findings of Fact and Conclusions of Law. This action needs to be remanded to the lower court with instructions to modify the judgment to accurately reflect the Findings of Fact and Conclusions of Law.

Second, Fashion Place agrees that Glad Rags is entitled

to have the security deposit credited against the judgment awarded herein, and hereby stipulates to a surrender of the passbook upon satisfaction of the judgment.

Finally, Fashion Place should be awarded reasonable attorney's fees incurred by it in this appeal. Attorney's fees were awarded by the lower court, and are provided for in the lease agreement. (Exhibit 1; R. 30).

DATED this 23 day of July, 1985.

Respectfully submitted,

GREEN & BERRY

Raymond Scott Berry
Attorney for Fashion Place Associates

JK45

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and accurate copies of the foregoing Brief of Respondent and Cross-Appellant to Ralph C. Petty attorney for Appellant at 721 Kearns Building, Salt Lake City, Utah 84101 this 23 day of July, 1985.

SUBSCRIBED AND SWORN to before me this 23 day of July, 1985.

Notary Public
Residing at: Salt Lake County
Utah

My commission expires:
4-4-88

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FASHION PLACE ASSOCIATES, a Limited Partnership, Plaintiff, vs. GLAD RAGS, INC., a Utah Corporation, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil NO. C82-8908 Judge David B. Dee

The above-entitled action came on for non-jury trial, pursuant notice, on December 12, 1984, Raymond Scott Berry appearing on behalf of Plaintiff and Ralph Petty appearing on behalf of Defendant. The Honorable David B. Dee presiding as trier-of-fact. The parties advised the Court that they were ready to proceed. Plaintiff and Defendant called witnesses, who were sworn and gave testimony, and introduced documentary evidence, which was received by the Court. Both sides rested their case, and pursuant to request of the Court closing arguments were submitted in written form. Good cause appearing therefore, this Court makes the following:

FINDINGS OF FACT

1. That Plaintiff as Lessor and Defendant as Lessee entered into a written Lease Agreement. (Plaintiff's Exhibit No. 1) The lease term was for fifteen (15) years and the expiration date of the term was December 31, 1990.

2. The Defendant breached the Lease Agreement by:

a. Abandoning the premises on or about December 31, 1981.

b. Failing to pay the lease charges required by the Lease Agreement after December 31, 1981.

3. That Plaintiff made reasonable efforts to relet the premises at a fair market value, and that said premises were actually relet on or about April 1, 1983.

4. That between December 31, 1981 and the date of the abandonment April 1, 1983, the date on which the premises were relet, lease arrearages required under the Lease Agreement accrued in the amount of $24,467.87.

5. That the Lessor did not, in writing, waive any provision of the Lease Agreement, and that the Center Manager, Robert Garwood, did not have authority to modify the lease.

6. That under the terms of the written Lease Agreement, Plaintiff is entitled to recover attorney's fees incurred in this action, and that Plaintiff incurred reasonable costs in the amount of $329.59, and reasonable attorney's fees in the amount of $4,515.00, through trial of the action.

7. Fixtures.

a. The allegedly converted fixtures were actually abandoned by the Defendant and never requested their return prior to the reletting of the premises.

b. That the signs abandoned by Defendant (items 1 and 2) have no fair market value since no market exists for the signs of Glad Rags Inc., a continuing company.

c. That the Defendant's expert witness, Mr. Kyser, had not seen any of the allegedly converted items, did not know how old they were, and had no independent knowledge of their condition.

d. That items no. 12, 13, 14 and 15 on the schedule of allegedly converted fixtures, were light fixtures, which are the property of the Plaintiff under the provisions of the Lease Agreement. (Article 14, page 13).

8. That under Section 78-26-12.6 UCA (1953 as amended) the premises were abandoned and Plaintiff is entitled to retake the premises and attempt to rent them at a fair rental value, and that Defendant is therefore liable for the rent accrued during the period necessary to rent the premises at a fair rental value.

CONCLUSIONS OF LAW

Based on the Findings of Fact set forth above, and good cause appearing therefore, this Court hereby makes the following Conclusions of Law.

1. That Plaintiff as Lessor and Defendant as Lessee entered into a written Lease Agreement. (Plaintiff's Exhibit No. 1) The Lease term was for fifteen (15) years and the expiration date of the term was December 31, 1990.

2. The Defendant breached the Lease Agreement by:

a. Abandoning the premises on or about December 31, 1981.

b. Failing to pay the lease charges required by the Lease Agreement after December 31, 1981.

3. That Plaintiff made reasonable efforts to relet the premises at a fair market value, and that said premises were actually relet on or about April 1, 1983.

4. That between December 31, 1981 and the date of the abandonment, April 1, 1983, the date on which the premises were relet, lease arrearages required under the Lease Agreement accrued in the amount of $24,467.87.

5. That the Lessor did not, in writing, waive any provision of the Lease Agreement, and that the Center Manager, Robert Garwood, did not have authority to modify the lease.

6. That under the terms of the written Lease Agreement, Plaintiff is entitled to recover attorney's fees incurred in this action, and that Plaintiff incurred reasonable costs in the amount of $329.59, and reasonable attorney's fees in the amount of $4,515.00, through trial of the action.

7. Fixtures.

a. The allegedly converted fixtures were actually abandoned by the Defendant and Defendant never requested their return prior to the reletting of the premises.

b. That the signs abandoned by Defendant (items 1 and 2) have no fair market value since no market exists for the signs of Glad Rags, Inc., a continuing company.

c. That the Defendant's expert witness, Mr. Kyser, had not seen any of the allegedly converted items, did not know how old they were, and had no independent knowledge of their condition.

d. That items no. 12, 13, 14 and 15 on the schedule of allegedly converted fixtures, were light fixtures, which are the property of the Plaintiff under the provisions of the Lease Agreement. (Article 14, page 13).

8. That under Section 78-26-12.6 UCA (1953 as amended) the premises were abandoned and Plaintiff is entitled to retake the premises and attempt to rent them at a fair rental value, and that Defendant is therefore liable for the rent accrued during the period necessary to rent the premises at a fair rental value.

9. Plaintiff is entitled to judgment against Defendant in the following categories:

Accrued lease charges	$12,233.00
Attorney's fees	$ 4,515.00
Costs	$ 329.59
TOTAL:	$17,077.59

10. That Defendant's Counterclaim should be dismissed with prejudice, no cause of action.

DATED this 8 day of February, 1985.

BY THE COURT:

Judge of the District Court

GREEN, HIGGINS & BERRY
Raymond Scott Berry (0311)
Attorney for Plaintiff
900 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
(801) 363-5650

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FASHION PLACE ASSOCIATES, A Limited Partnership,	Bk 195 No. 3197 2-14-85-8.16am
Plaintiff,	JUDGMENT
vs.	Civil No. C82-8908
GLAD RAGS, INC., a Utah Corporation,	Judge David B. Dee
Defendant.	

The above-entitled action came on regularly for non-jury trial, pursuant to Notice, December 12, 1984, Raymond Scott Berry appearing on behalf of Plaintiff and Ralph Petty appearing on behalf of the Defendant, the Honorable David B. Dee presiding as trier-of-fact. The parties advised the Court that they were ready to proceed. The Plaintiff and Defendant called witnesses, who were sworn and gave testimony, and introduced documentary evidence, which was received by the Court. Both sides rested their cases, and closing arguments were submitted in written form pursuant to the request of the Court. Having reviewed the evidence presented at trial, and having considered the arguments of counsel, and having entered the Findings of Fact and

Conclusions of Law pursuant to the provisions of the Utah Rules of Civil Procedure, this Court

ORDERS, ADJUDGES AND DECREES as follows:

1. Judgment is hereby entered in favor of Plaintiff against this Defendant in the amount of $17,077.59, said sum including therein attorney's fees in the amount of $4,515.00 and costs of court in the amount of $329.00. Said judgment shall bear interest at the statutory rate until paid.

2. Defendant's Counterclaim is dismissed with prejudice, no cause of action.

DATED this 8 day of ~~January~~ Feb, 1985.

BY THE COURT:

Judge of the District Court

FASHION PLACE LEASE

TABLE OF CONTENTS

GLAD RAGS, INC.

Tenant

FASHION PLACE LEASE

In consideration of the rents and covenants hereinafter set forth, Landlord hereby leases to Tenant, and Tenant hereby rents from Landlord, the following described premises upon the following terms and conditions:

Article 1
FUNDAMENTAL LEASE PROVISIONS:

Date: June 10, 1974

Landlord: Fashion Place Associates, a Limited Partnership, in which Ernest W. Hahn, Inc., is the General Partner.

Tenant: Glad Rags, Inc., a Utah Corporation

Tenant's Trade Name: Glad Rags (Article 7 and Exhibit "B")

Lease Term: Fifteen (15) full calendar years (plus a partial calendar year, if any, prior to the first full calendar year). (Article 4)

Minimum Annual Rental: Thirteen Thousand Six Hundred--------- Dollars ($ 13,600.00) per annum, payable in twelve (12) equal monthly installments during each year. (Article 5A)

Percentage Rental: Six percent (6 %) (Article 5C)

Tenant's Share of Enclosed Mall Expenses: 1.04 percent (1.04 %) (Article 20)

Address for Notices:

To Landlord: 2311 West El Segundo Boulevard
Hawthorne, California 90250
and to Landlord's management
office in the Shopping Center

To Tenant: To the demised premises and (Article 31)
2147 East 21st South
Salt Lake City, Utah 84109

Security Deposit: Two Thousand ~~Six~~ Two Hundred Sixty-Seven---------- Dollars ($ ~~2,667.00~~ 2,267.00). (Article 31)

References in this Article 1 to other Articles are for convenience and designate some of the other Articles where references to the particular Fundamental Lease Provisions appear. Each reference in this Lease to any of the Fundamental Lease Provisions contained in this Article 1 shall

be construed to incorporate all of the terms provided under each such Fundamental Lease Provision. In the event of any conflict between any Fundamental Lease Provision and the balance of the Lease, the latter shall control.

Article 2
EXHIBITS

The following drawings and special provisions are attached hereto as exhibits and made a part of this Lease:

EXHIBIT "A" - General site plan of an integrated retail shopping center to be known as "Fashion Place" which Landlord and others intend to construct or cause to be constructed on approximately 61 acres of land in the City of Murray, County of Salt Lake, State of Utah, and being located on the northeast corner of 6100 South Street and State Street, hereinafter referred to as the "Shopping Center." Said site plan shows, among other things, the principal improvements which will comprise said shopping center. Tenant acknowledges that the site plan shown on Exhibit "A" is tentative and that Landlord may change the shape, size, location, number and extent of the improvements shown thereon and eliminate or add any improvements to any portion of the Shopping Center, provided that Landlord shall not change the size or location of the premises without the Tenant's consent.

EXHIBIT "B" - Description of the premises, authorized use and Tenant's trade name.

EXHIBIT "C" - Description of work to be performed by Landlord and by Tenant in or on the premises.

~~EXHIBIT "D" - Ground Lease~~

EXHIBIT "E" - Tenant's Certificate.

EXHIBIT "F" - Sign Criteria.

EXHIBIT "G" - ASSIGNMENT OF PASSBOOK.

Article 3
PREMISES

The Landlord hereby leases and demises unto the Tenant and the Tenant hereby leases and takes from the Landlord, for the term, at the rental, and upon the covenants and conditions hereinafter set forth, the commercial space referred to herein as the "premises," and described on Exhibit "B" attached hereto and made a part hereof. The premises shall be constructed in accordance with the procedures outlined in Exhibit "C" attached hereto and made a part hereof.

Article 4
TERM

The term of this Lease shall begin as of the date hereof and shall continue thereafter during the Lease Term specified in Article 1 hereof, unless sooner terminated as hereinafter provided in this Lease. Said Lease Term shall be computed from the first day of January of the year following the date when the minimum annual rental provided for in Article 1 hereof shall have commenced. The Landlord agrees to deliver to the Tenant, and the Tenant agrees to accept from the Landlord, possession of the premises forthwith upon completion of the Landlord's Work in the premises as

described in Exhibit "C" hereof. Certification of the architect by whom the final plans and specifications were prepared that the Landlord's Work in the premises has been completed in accordance with said Exhibit "C" shall be conclusive and binding upon the parties hereto. In the event the minimum annual rental provided for in Article 1 has not commenced within three (3) years from the date hereof, then this Lease shall terminate as of said date and each of the parties hereto shall be released from any further obligation hereunder.

Within ten (10) days after the minimum annual rental provided for in Article 1 has commenced, Tenant will execute and deliver to Landlord a certificate substantially in the form attached hereto, marked Exhibit "E" and made a part hereof, indicating thereon any exceptions thereto which may exist at that time. Failure of the Tenant to execute and deliver such certificate shall constitute an acceptance of the premises and an acknowledgment by Tenant that the statements included in Exhibit "E" are true and correct, without exception. In addition thereto, if Tenant fails to execute and deliver such statement to Landlord within said ten-day period, Landlord may, as attorney in fact of Tenant, coupled with an interest, execute such statement for, and on behalf, and in the name of the Tenant. If requested by Landlord in writing, Tenant shall give similar certificates from time to time during the term of this Lease in the manner hereinabove provided.

Article 5
RENTAL

The Tenant agrees to pay as rental for the use and occupancy of the premises, at the times and in the manner hereinafter provided, the following sums of money:

A. MINIMUM ANNUAL RENTAL. The minimum annual rental specified in Article 1 hereof shall be payable in twelve (12) equal monthly installments during each year, in advance, on the first day of each calendar month, without offset or deduction, commencing ~~sixty (60) days after the completion of the Landlord's Work in the premises as described in Exhibit "C" hereof,~~ *on the first day of March, 1975, or when the Tenant opens for business, whichever is earlier. Should the rental period commence on a day of the month other than the first day of such month, then the rental for the first fractional month shall be computed on a daily basis for the period from the date of commencement to the end of such calendar month and at an amount equal to one-three hundred sixtieth (1/360) of the said minimum annual rental for each such day, and thereafter shall be computed and paid as aforesaid.

B. TAXES. In addition to and commencing with the minimum annual rental provided for in paragraph A above, the Tenant agrees to pay to Landlord, as additional rent, during each year or partial year of the term of this Lease, the amount (if any) by which the taxes and assessments levied and assessed for any such year upon the premises and the underlying realty shall exceed an amount equal to Thirty-five Cents ($.35) multiplied by the number of square feet of Floor Area contained in the premises. Such additional rent for any partial year of the term hereof shall be prorated on a time basis. Payment shall be made by Tenant within thirty (30) days after receipt of a written statement from Landlord setting forth the amount of such tax excess and showing in reasonable detail the manner in which it has been computed.

In the event the premises and the underlying realty are not separately assessed, but are part of a larger parcel for assessment purposes (hereinafter referred to as the "larger parcel"), "taxes and assessments levied and assessed upon the premises and the underlying realty" shall mean a

*on the first day of March, 1975,

fractional portion of said taxes and assessments on the [illegible] ments on any common areas thereon) the numerator of [illegible] premises and the denominator of which shall be the [illegible] exclusive use and occupancy by tenants of the buyer premises [illegible] open for business, provided that an equitable adjustment shall be made [illegible] partially completed on the date such taxes and assessments [illegible] assessments which may be levied against or upon the premises [illegible] under the laws then in force may be evidenced by imposition [illegible] annual installments, only the amount of such annual installment [illegible] partial year) and statutory interest shall be included within the [illegible] assessments levied against the premises and the underlying [illegible] "taxes" shall also include any tax assessed upon or measured [illegible] in connection with this Lease.

C. PERCENTAGE RENTAL. Tenant shall also pay [illegible] of the Tenant (as the term "net sales" is defined in Article [illegible] premises during each calendar year. Said percentage rental [illegible] quarter and, on or before the twentieth (20th) day of the [illegible] the close of each such period, the Tenant shall pay to the Landlord [illegible] so computed as a percentage of net sales of the Tenant during such [illegible] rental which the Tenant shall have paid during such period [illegible] referred to shall be the percent specified as "Percentage Rental [illegible]

At the close of each calendar year and within thirty [illegible] determined the net sales of the Tenant during said calendar year [illegible] lord as minimum annual rental for said calendar year [illegible] percentage rental; and thereupon an adjustment shall be made [illegible] follows: If the Tenant shall have paid to the Landlord more [illegible] quired to pay under the terms hereof, the Tenant shall be entitled [illegible] amount or, if the Tenant shall have paid an insufficient amount [illegible] hereunder, then Tenant shall forthwith pay such deficiency [illegible]

For the purpose of computing the percentage rental which [illegible] rentals commence shall be added to the minimum annual rental [illegible] centage rent due and payable for that calendar year over and above [illegible] of minimum annual rental which Tenant shall have paid [illegible]

D. STATEMENT OF SALES. [illegible] to the Landlord a statement of the net sales [illegible] each calendar month, and an annual statement [illegible] each calendar year. Such statements shall be certified [illegible] or by a responsible officer of the Tenant [illegible]

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account, records and other pertinent data of the gross sales and "net sales" as hereinafter defined, and business relating to the premises (including the gross sales and net sales of any subtenant, licensee or concessionaire) and such books and records shall be kept for a period of two (2) years after the close of each calendar year. The receipt by Landlord of any statement or any payment of percentage rental for any period shall not bind it as to the correctness of the statement or the payment. Within two (2) years after the receipt of any such statement, Landlord at any time shall be entitled to an audit of such gross sales and net sales either by Landlord or by a certified public accountant to be designated by Landlord. Such audit shall be limited to the determination of the "net sales" as defined in this Lease and shall be conducted during normal business hours and either at the premises or the principal place of business of Tenant. If it shall be determined as a result of such audit that there has been a deficiency in the payment of percentage rent, then such deficiency shall become immediately due and payable with interest at the rate of ten percent (10%) per annum from the date when said payment should have been made. In addition, if Tenant's statement for the pertinent calendar year shall be found to have understated net sales by more than two percent (2%) and Landlord is entitled to any additional percentage rental as a result of said understatement, then the Tenant shall pay all of Landlord's reasonable costs and expenses connected therewith. Any information gained from such statements or inspection shall be confidential and shall not be disclosed other than to carry out the purposes hereof; provided, however, Landlord shall be permitted to divulge the contents of any such statements in connection with any financing arrangements or assignments of Landlord's interest in the premises or in connection with any administrative or judicial proceedings in which Landlord is involved and where Landlord may be required to divulge such information.

E. The Tenant shall pay, as additional rent, all sums of money required to be paid pursuant to the terms of this Article 5, the sums to be paid pursuant to Articles 19, 20 and 29 of this Lease, and all other sums of money or charges required to be paid by Tenant under this Lease, whether or not the same be designated "additional rent." If such amounts or charges are not paid at the time provided in this Lease, they shall nevertheless be collectible as additional rent with the next installment of minimum annual rental thereafter falling due, but nothing herein contained shall be deemed to suspend or delay the payment of any amount of money or charge at the time the same becomes due and payable hereunder, or limit any other remedy of Landlord.

F. If Tenant shall fail to pay, when the same is due and payable, any rent or any additional rent, or amounts or charges of the character described in Article 5E hereof, such unpaid amounts shall bear interest at the rate of ten percent (10%) per annum from the date due to the date of payment. In addition to such interest, if Tenant shall fail to pay any monthly installment of minimum annual rental by the fifth day of the month such installment is due, a late charge equal to one-thirtieth (1/30) of the monthly installment of minimum annual rental shall be assessed and shall accrue for each day beyond said fifth day of the month until such rental, including the late charge, is paid in full.

G. All rental and other payments shall be paid by the Tenant to the Landlord at its management office in the Shopping Center, or at such other place as may from time to time be designated by the Landlord in writing at least ten (10) days prior to the next ensuing payment date.

Article 6
DEFINITION OF "NET SALES"

"Net sales" of the Tenant, as used in this Lease, is defined to be the gross selling price of all merchandise or services sold in or from the premises by the Tenant, its subtenants, licensees and

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Article 16
TENANT'S CONDUCT OF BUSINESS

The Tenant covenants and agrees that, continuously and uninterruptedly from and after its initial opening for business, it will operate and conduct within the premises the business which it is permitted to operate and conduct under the provisions hereof, except while the premises are untenantable by reason of fire or other casualty, and that it will at all times keep and maintain within and upon the premises an adequate stock of merchandise and trade fixtures to service and supply the usual and ordinary demands and requirements of its customers and that it will keep its premises in a neat, clean and orderly condition. Tenant agrees that all trash and rubbish of the said Tenant shall be deposited within receptacles and that there shall be no trash receptacles permitted to remain outside of the building. Tenant further agrees to cause such receptacles to be emptied and trash removed at its own cost and expense.

Recognizing that it is in the interests of both the Tenant and the Landlord to have regulated hours of business for all of the Shopping Center, Tenant agrees that commencing with the opening for business by Tenant in the premises and for the remainder of the term of this Lease, Tenant shall be open for business daily, Sundays and State and National Holidays excepted, and shall continuously so remain open for business at least those days and hours as any one (1), of the two (2) department stores shall be open for business. Tenant further agrees to have its window displays, exterior signs and exterior advertising displays adequately illuminated continuously during such hours as any of the department stores shall illuminate their window displays, exterior signs and exterior advertising displays. It is agreed, however, that the foregoing provisions shall be subject, as respects any business controlled by governmental regulations or labor union contracts in its hours of operation, to the hours of operation so prescribed by such governmental regulations or labor union contracts, as the case may be.

The Tenant agrees that it will not, during the term of this Lease, directly or indirectly, operate nor own any similar type of business within a radius of three (3) miles from the location of the premises. Without limiting Landlord's remedies, in the event Tenant should violate this covenant, Landlord may, at its option, include the "net sales" of such other business in the "net sales" transacted from the premises for the purpose of computing the percentage rent due hereunder.

Article 17
REPAIRS AND MAINTENANCE

The Tenant agrees at all times, from and after delivery of possession of the premises to the Tenant, and at its own cost and expense, to repair and maintain in good and tenantable condition the premises and every part thereof, excluding the roof, exterior walls, structural parts of the premises and structural floor (floor covering, including carpeting, terrazzo or other special flooring installed by or at the request of Tenant, to be maintained by the Tenant), and including without limitation the utility meters, pipes and conduits, all fixtures, air conditioning and heating equipment serving the premises, and other equipment therein, the store front or store fronts, all Tenant's signs, locks and closing devices, and all window sash, casement or frames, door and door frames, and all such items of repair, maintenance and improvement or reconstruction as may at any time or from time to time be required by a governmental agency having jurisdiction thereof. All glass, both exterior and interior, is at the sole risk of Tenant, and any glass broken shall be promptly replaced by Tenant with glass of the same kind, size and quality.

this Lease, by the major department stores in the Shopping Center shall be credited toward payment of the entirety of such enclosed mall operation and maintenance expense. Tenant shall pay as its share of the cost of such expenses the percentage specified in Article 1 as "Tenant's Share of Enclosed Mall Expense." Commencing on the date the minimum annual rental provided for in Article 1 hereof has commenced, and thereafter on the first day of each calendar month of the term of this Lease, Tenant shall pay to Landlord an amount estimated by Landlord to be Tenant's share of such enclosed mall operation and maintenance expenses. Landlord may adjust the monthly enclosed mall operation and maintenance expense charge of Tenant at the end of any calendar quarter on the basis of Landlord's experience and reasonably anticipated costs. Within thirty (30) days following the end of each calendar quarter, Landlord shall furnish Tenant a statement covering the calendar quarter just expired, certified as correct by a certified public accountant or an authorized representative of Landlord, showing the total enclosed mall operation and maintenance expense, the amount of Tenant's share of such expenses for such calendar quarter, and the payments made by Tenant with respect to such calendar quarter as set forth above. If Tenant's share of such expenses exceeds Tenant's payments so made, Tenant shall pay Landlord the deficiency within ten (10) days after receipt of said statement. If said payments exceed Tenant's share of such expenses, Tenant shall be entitled to offset the excess against payments next thereafter to become due Landlord as set forth above.

Tenant, provided its premises fronts on the enclosed mall, agrees, during all business hours, to operate the heating, ventilating and air conditioning equipment serving the premises so that inside temperatures are maintained (i) within a range in which a majority of adults will be comfortable in the premises and (ii) which will not unduly drain heat, ventilation or cooled air from the enclosed mall. Landlord agrees to cause the heating, ventilating and air conditioning equipment serving the enclosed mall to be so operated during such hours that heat, ventilation and cooled air are not unduly drained from the premises.

Article 21
BANKRUPTCY INSOLVENCY

The Tenant agrees that in the event all or substantially all of the Tenant's assets be placed in the hands of a receiver or trustee, and such receivership or trusteeship continues for a period of thirty (30) days, or should the Tenant make an assignment for the benefit of creditors or be finally adjudicated a bankrupt, or should the Tenant institute any proceedings under the Bankruptcy Act as the same now exists or under any amendment thereof which may hereafter be enacted, or under any other act relating to the subject of bankruptcy wherein the Tenant seeks to be adjudicated a bankrupt, or to be discharged of its debts, or to effect a plan of liquidation, composition or reorganization, or should any involuntary proceeding be filed against the Tenant under any such bankruptcy laws and such proceeding not be removed within ninety (90) days thereafter, then this Lease or any interest in and to the premises shall not become an asset in any of such proceedings and, in any such events and in addition to any and all rights or remedies of the Landlord hereunder or by law provided, it shall be lawful for the Landlord to declare the term hereof ended and to re-enter the premises and take possession thereof and remove all persons therefrom, and the Tenant shall have no further claim thereon or hereunder. The provisions of this Article 21 shall also apply to any Guarantor of this Lease.

Article 22
DEFAULTS BY TENANT

Should the Tenant at any time be in default hereunder with respect to any rental payments or other charges payable by the Tenant hereunder, and should such default continue for a period of

tive (5) days after written notice from Landlord to Tenant, or should the Tenant be in default in the prompt and full performance of any other of its promises, covenants or agreements herein contained and should such default or breach of performance continue for more than a reasonable time (in no event to exceed thirty (30) days) after written notice thereof from the Landlord to the Tenant specifying the particulars of such default or breach of performance; or should the Tenant vacate or abandon the premises; then the Landlord may treat the occurrence of any one or more of the foregoing events as a breach of this Lease, and in addition to any or all other rights or remedies of the Landlord hereunder and by the law provided, it shall be, at the option of the Landlord, without further notice or demand of any kind to Tenant or any other person:

(a) The right of the Landlord to declare the term hereof ended and to re-enter the premises and take possession thereof and remove all persons therefrom, and the Tenant shall have no further claim thereon or thereunder; or

(b) The right of the Landlord without declaring this Lease ended to re-enter the premises and occupy or lease the whole or any part thereof for and on account of the Tenant and upon such terms and conditions and for such rent as the Landlord may deem proper and to collect said rent and any other rent that may thereafter become payable and apply the same toward the amount due or thereafter to become due from the Tenant and on account of such expenses of such subletting and any other damages sustained by the Landlord; and should such rental be less than that herein agreed to be paid by the Tenant, the Tenant agrees to pay such deficiency to the Landlord in advance on the day of each month hereinbefore specified for payment of minimum annual rental and to pay to the Landlord forthwith upon any such reletting the costs and expenses the Landlord may incur by reason thereof; or

(c) The right of the Landlord, even though it may have relet said premises, to thereafter elect to terminate this Lease and all of the rights of the Tenant in or to the premises.

Should the Landlord have relet the premises under the provisions of subparagraph (b) above, it may execute any such lease either in its own name or in the name of the Tenant as it shall see fit, but the tenant therein named shall be under no obligation whatsoever to see to the application by Landlord of any rent collected by Landlord from such tenant, nor shall the Tenant hereunder have any right or authority whatever to collect any rent from such tenant. The Landlord shall not be deemed to have terminated this Lease, or the liability of the Tenant to pay rent thereafter to accrue, or its liability for damages under any of the provisions hereof, by any such re-entry or by any action in unlawful detainer, or otherwise, to obtain possession of the premises, unless the Landlord shall have notified the Tenant in writing that it has so elected to terminate this Lease, and the Tenant further covenants that the service by the Landlord of any notice pursuant to the unlawful detainer statutes of the State of Utah and the surrender of possession pursuant to such notice shall not (unless the Landlord elects to the contrary at the time of or at any time subsequent to the serving of such notices and such election be evidenced by a written notice to the Tenant) be deemed to be a termination of this Lease. Nothing herein contained shall be construed as obligating the Landlord to relet the whole or any part of the premises. In the event of any entry or taking possession of the premises as aforesaid, the Landlord shall have the right, but not the obligation, to remove therefrom all or any part of the personal property located therein and may place the same in storage at a public warehouse at the expense and risk of the owner or owners thereof.

In the event of Tenant's default and Landlord's retaking of possession of the premises, whether this Lease is terminated by Landlord or not, Tenant agrees to pay to Landlord as an additional item of damages the cost of repairs, alterations, redecorating, leasing commissions and Landlord's other expenses incurred in reletting the premises to a new tenant.

Should the Landlord elect to terminate this Lease under the provisions of subparagraphs (a) or (c) above, the Landlord shall thereupon, without waiting for the end of the term hereof, be entitled to recover from the Tenant as damages the difference, if any, between the then reasonable rental value of the premises for the period of the term reserved in the Lease and the amount of rental and other charges payable by the Tenant for the balance of the term of this Lease, together with the rent then unpaid, if any.

For all purposes of this Article 22, the rental agreed to be paid by the Tenant or the amount of rental payable by the Tenant shall be deemed to be the minimum annual rental and all other sums required to be paid by Tenant pursuant to the terms of this Lease. All such sums, other than the minimum annual rental, shall be computed on the basis of the average monthly amount thereof accruing during the immediately preceding sixty (60) month period, except that if it becomes necessary to compute such rental before such a sixty (60) month period has occurred then on the basis of the average monthly amount thereof accruing during such shorter period.

In the event of default, all of the Tenant's fixtures, furniture, equipment, improvements, additions, alterations, and other personal property, shall remain on the subject premises and in that event, and continuing during the length of said default, Landlord shall have the right to take the exclusive possession of same and to use same, rent or charge free, until all defaults are cured or, at its option, at any time during the term of this Lease, to require Tenant to forthwith remove same.

Notwithstanding any other provisions of this Article, the Landlord agrees that if the default complained of, other than for the payment of monies, is of such a nature that the same cannot be rectified or cured within the thirty (30) day period requiring such rectification or curing as specified in the written notice relating thereto, then such default shall be deemed to be rectified or cured if the Tenant within such period of thirty (30) days shall have commenced the rectification and curing thereof and shall continue thereafter with all due diligence to cause such rectification and curing and does so complete the same with the use of such diligence as aforesaid.

The remedies given to the Landlord in this Article shall be in addition and supplemental to all other rights or remedies which the Landlord may have under the laws then in force.

The waiver by Landlord of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay the particular rental so accepted, regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such rent. No covenant, term, or condition of this Lease shall be deemed to have been waived by Landlord, unless such waiver be in writing by Landlord.

Article 23
DEFAULT BY LANDLORD

In the event Landlord shall neglect or fail to perform or observe any of the covenants, provisions or conditions contained in this Lease on its part to be performed or observed within thirty

on" in the third sentence; substituted "be sued immediately" in the third sentence for not be issued until the expiration of five ays"; deleted "within which time the tenant any subtenant, or any mortgagee of the rm, or other party interested in its continuance, may pay into court for the landlord the nount of the judgment and costs, and ereupon the judgment shall be satisfied, d the tenant shall be restored to his estate; t if payment as herein provided is not ade within the five days, the judgment may enforced for its full amount and for the ssession of the premises" at the end of the ird sentence; deleted "other" before "cases" in the last sentence; and made minor changes in phraseology and punctuation.

Treble damages.

Plaintiff's failure to comply with the provisions of 78-36-8 converted his action for unlawful detainer into one at common law for ejectment and defeated his right under this section to treble damages. Pingree v. Continental Group of Utah, Inc. (1976) 558 P 2d 1317.

Law Reviews.

Forfeiture Under Installment Land Contracts in Utah, 1981 Utah L. Rev. 803, 807.

78-36-11. Time for appeal.

ction applicable.

A party has ten days, as provided by this ction, and not one month, as provided by Rule 73(a), U.R.C.P., in which to appeal from a judgment for unlawful detainer. Ute-Cal Land Development v. Intermountain Stock Exchange (1981) 628 P 2d 1278.

78-36-12. Exclusion of tenant without judicial process prohibited — Abandoned premises excepted. It is unlawful for an owner to willfully exclude a tenant om the tenant's premises in any manner except by judicial process, provided, an ner or his agent shall not be prevented from removing the contents of the leased emises under section 78-36-12.6 (b) [78-36-12.6(2)] and retaking the premises and tempting to rent them at a fair rental value when the tenant has abandoned the emises.

History: C. 1953, 78-36-12, enacted by L. 81, ch. 160, § 6.

78-36-12.3. Definitions. (1) "Willful exclusion" means preventing the tenant om entering into the premises with intent to deprive the tenant of such entry.
(2) "Owner" means the actual owner of the premises and shall also have the me meaning as landlord under common law and the statutes of this state.
(3) "Abandonment" is presumed in either of the following situations:
(a) The tenant has not notified the owner that he or she will be absent from e premises, and the tenant fails to pay rent within 15 days after the due date, d there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or
(b) The tenant has not notified the owner that he or she will be absent from e premises, and the tenant fails to pay rent when due and the tenant's personal operty has been removed from the dwelling unit and there is no reasonable evinnce that the tenant is occupying the premises.

History: C. 1953, 78-36-12.3, enacted by L. 81, ch. 160, § 7.

78-36-12.6. Abandoned premises — Retaking and rerenting by owner — ability of tenant — Personal property of tenant left on premises. In the event abandonment the owner may:
(1) Retake the premises and attempt to rent them at a fair rental value and e tenant who abandoned the premises shall be liable:
(a) For the entire rent due for the remainder of the term;
(b) For rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection shall apply, if less than subsection (a) notwithstanding that the owner did not re-rent the premises.
(2) If the tenant has abandoned the premises and has left personal property on the premises, the owner is entitled to remove the property from the dwelling, store it for the tenant, and recover actual moving and storage costs from the tenant. The owner shall make reasonable efforts to notify the tenant of the location of the personal property; however, if the property has been in storage for over 30 days and the tenant has made no reasonable effort to recover it, the owner may sell the property and apply the proceeds toward any amount the tenant owes. Any money left over from the sale of the property shall be handled as specified in section 78-44-11. Nothing contained in this act shall be in derogation of or alter the owner's rights under Chapter 3 of Title 38.

History: C. 1953, 78-36-12.6, enacted by L. 1981, ch. 160, § 8.

CHAPTER 37

MORTGAGE FORECLOSURE

78-37-1. Form of action — Judgment — Special execution.

Multiple parcels offered at single foreclosure sale.

A valid foreclosure sale results in the satisfaction of a specific mortgage debt from the sale proceeds attributable to the encumbered property; where multiple parcels of realty are offered at a single foreclosure sale, the proceeds from each parcel are applied to satisfy only the related mortgage debt. Bawden & Associates v. Smith (1982) 646 P 2d 711.

Nature of action.

Proceeding to foreclose upon a mortgage is an action in rem or quasi in rem. 1ST National Credit Corp. v. Von Hake (1981) 511 FSupp 634.

Necessity of exhausting security.

Mortgagee is required to exhaust its security by foreclosure and sale of the mortgaged property before it can reach the genera assets of the debtor by writ of attachment Bank of Ephraim v. Davis (1978) 581 P 2 1001.

Pledge of personal property.

The rights of a creditor secured by a pledge of personal property are governed by the Uniform Commercial Code, not this section. Kennedy v. Bank of Ephraim (1979) 59 P 2d 881.

Law Reviews.

Equitable Considerations of Mortgag Foreclosure and Redemption in Utah: A Nee for Remedial Legislation, 1976 Utah L. Rev 327.

78-37-6. Right of redemption, etc.

Extension of time to redeem.

A court sitting in equity has discretion to extend the time period of redemption. Mollerup v. Storage Systems Internationa (1977) 569 P 2d 1122.